

## Discrimination: The Law vs. Morality

*But if thought corrupts language, language can also corrupt thought.*  
*George Orwell*

Do people have a right to discriminate? That question can be approached at least two ways: (a) what is the legal answer and (b) what might be the moral answer? The distinction is important since acts that are legal might not be moral and conversely those that are moral might not be legal. South Africa's apartheid was both legal and constitutional but morally repugnant. During slavery in the U.S., assisting a runaway slave was moral but it was in violation of the Fugitive Slave Act of 1850.<sup>1</sup> To approach the question of whether people have, or should have a right, to discriminate, we might begin by attempting to give the term discrimination operational meaning to avoid confusing different forms of behavior.

One legal dictionary defines discrimination as: "n.unequal treatment of persons, for a reason which has nothing to do with legal rights or ability. Federal and state laws prohibit discrimination in employment, availability of housing, rates of pay, right to promotion, educational opportunity, civil rights, and use of facilities based on race, nationality, creed, color, age, sex or sexual orientation."<sup>2</sup> Another law dictionary defines discrimination

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<sup>1</sup>Fugitive Slave Act of 1850, Thirty-first Congress. Sess. I. Ch. 60. 1850.

<sup>2</sup>Gerald and Kathleen Hill, The Real Life Dictionary of the Law (2000), [Internet Source], retrieved 7/24/03, from the world wide web:

as: "any distinction, exclusion, restriction, or preference made on a particular basis, such as race, sex, religion, national origin, marital status, pregnancy, or disability, which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of life."<sup>3</sup> That same dictionary goes on to define racial discrimination as: "Any act involving a distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."<sup>4</sup> A United Nations Convention Against Discrimination in Education defined discrimination as follows: "The term discrimination includes any distinction, exclusion, limitation or preference which, being

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<http://Dictionary.law.com/definition2.asp?selected=532&bold=%7C%7C%7C%7C>.

<sup>3</sup>HR-Net Group Hellenic Resources Institute, Inc., "International Convention on the Elimination of All Forms of Racial Discrimination," (New York: March, 1966), [Internet Source], retrieved 7/25/03, from the world wide web: <http://www.hri.org/docs/ICERD66.html>.

<sup>4</sup>Attorney-General's Department. Scale Plus Law Resource. "Racial Discrimination Act 1975 - Sect. 9. Racial discrimination to be unlawful. (1)" (1975), [Internet Source], retrieved 7/25/03, from the world wide web: <http://scaleplus.law.gov.au/html/pasteact/0/47/0/PA000170.htm>.

based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment."<sup>5</sup>

While these definitions of discrimination might be useful they fall short of being operationally useful in the sense that they mix several kinds of behavior and lead to confusion. Gains in understanding can be made if we simplify the definition such that one act is not confused with another.

#### Discrimination Operationally Defined

More generally, and inclusive of legal attempts to define the term, discrimination might be operationally defined as, the act of choice or selection. All selection necessarily and simultaneously requires non-selection. Choice requires discrimination. When one chooses to attend the University of Chicago, he non-selects Harvard University as well as every other university. When one selects a Bordeaux wine, he non-selects a Burgundy wine. If we wished, we might call these cases university discrimination and wine discrimination. Similarly, when the term discrimination is modified with the nouns race and sex, we merely specify the criterion upon which the choice is made; instead of university and wine discrimination,

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<sup>5</sup>Vernon Van Dyke, "Human Rights Without Discrimination," The American Political Science Review, Vol. 67, No. 4. (Dec., 1973), p. 1271.

it is race and sex discrimination.

At this juncture we might ask if there is any conceptual distinction between discriminating for or against particular universities, wines, and other goods and services and discriminating for or against particular races and sexes? Or should one discriminate at all? Can one make a case for indifference or random choice among objects of desire?

Indifference and random choice is hardly ever the case. Our lives are largely spent discriminating for or against selected activities, objects and people. Some of us discriminate against those who have criminal records, who bathe infrequently, who use vulgar speech and have improper social graces. Most of us choose mates within our own racial, ethnic group, or religion, hence discriminating against mates who, save for their race, ethnicity, and religion, might be just as suitable. According to the 1992 census, only 2.2 percent of Americans were married to someone other than their own race.<sup>6</sup> There is also evidence of discrimination based on physical characteristics in politics: not many short men have been elected president of the United States. In fact, twenty-two out of forty-two presidents have been five feet, eleven inches and taller, well above the population's average height.<sup>7</sup> That is

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<sup>6</sup>U.S. Bureau of the Census, 1960, 1970, and 1980 Subject Reports on Marital Status and 1991 and 1992 Current Population Reports, P20, nos. 461 and 468.

<sup>7</sup><http://www.webpresidentsusa.com/AP060303.htm>

not an expected random outcome. Furthermore, discrimination is not consistent. Sometimes people discriminate against theater entertainment in favor of parties, against women in favor of men; and at other times and circumstances the same people do the reverse.

One might be tempted to argue that racial discrimination in marriage does not have important social consequences, needy of a legal or political remedy, as other forms of racial discrimination.

But does have important social consequences. When there is assortive (non-random) mate selection, it heightens whatever group differences there are in the population.<sup>8</sup> When high I.Q. people marry other high I.Q. people, when high income people marry other high income people, and to the extent there is a racial correlation between these characteristics, racial discrimination in mate selection exaggerates the skewness in the population's intelligence and income distribution. There would be greater income equality if high I.Q. and high income people mated with low I.Q. and low income people. But I imagine that most people would be horrified by the suggestion of a mandate to require the same.<sup>9</sup>

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<sup>8</sup>Assortive or non-random selection of mating partners with respect to one or more characteristic is positive when like people mate more frequently than would be expected by chance and is negative when the reverse occurs.

<sup>9</sup>Gary S. Becker, "A Theory of Marriage: Part I," The Journal of Political Economy, Vol. 81, No. 4. (Jul. - Aug., 1973), pp. 813-846. "Mating of likes - positive assortive mating - is extremely common, whether measured by intelligence, height, skin color, age, education, family background, or religion, although unlikes sometimes also mate, as measured, say, by an inclination to nurture or succor,

It would appear that the term discrimination, defined simply as the act of choice, is morally neutral in the sense that there are no unambiguous standards that permit us to argue that the choice to attend University of Chicago or the choice to purchase a Bordeaux wine is more righteous than the choice to attend Harvard University and purchase a Burgundy wine. And more importantly, no argument can be produced for government forcing a person to select one university or wine over another. Moreover, no argument can be produced to force people to grant equal opportunity when choosing of universities and wines.

If people are free to discriminate in favor of, or against a university or wine, what argument can be made against their having that same right with respect to choosing any other object of desire including the race or sex characteristics of their mates, employees, tenants, or club members? If one shares the value of freedom of association, why should some associations be permitted and others denied? If a man is not permitted to bring a court action against a woman who refuses to deal with him, e.g., have a dating relationship or to establish a marital contract for any arbitrary reason she chooses, what is the case for bringing court action for other refusals to deal with another, e.g., employment, renting or selling a house, or club membership, for similar arbitrary reasons?

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to dominate or be deferential. This suggests that traits are typically but by no means always complements." p. 827.

Nobel Laureate Kenneth Arrow says, "There are many varieties of liberalism, which draw the boundaries between social and individual action in different places, but all agree in rejecting racial discrimination, by which is meant allowing racial identification to have a place in an individual's life chances."<sup>10</sup> However, if "allowing racial identification to have a place in an individual's life chances" means refusal to deal, what policy recommendations emerge?

Refusal to deal can apply to any setting including activities like marriage and friendship and invitations to social gatherings, all of which have the possibility of affecting one's "life chances." If refusal to deal is permitted in one activity, for any arbitrary reason, what case can be made for not permitting refusal to deal in other activities? The practical answer to this question has more to do with the threat of government violence against people who refuse to deal in prohibited ways than any kind of internally consistent logic.

### Preferences

In discussions on race, we hear descriptive terms and phrases like "discriminatory values"<sup>11</sup> and "discriminatory tastes."<sup>12</sup>

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<sup>10</sup>Kenneth J. Arrow, "What Has Economics to Say About Racial Discrimination?" Journal of Economic Perspectives, Vol 12, No. 2 (Spring 1998), p. 91.

<sup>11</sup>Kenneth J. Arrow, "What Has Economics to Say About Racial Discrimination?" Journal of Economic Perspectives, Vol 12, No. 2 (Spring 1998), p. 92.

<sup>12</sup>Kenneth J. Arrow, "What Has Economics to Say About Racial

Sometimes the behavior in question is described as prejudice, defined as "Ethnic prejudice is an antipathy based upon a faulty and inflexible generalization."<sup>13</sup>

For the most part, choices reflect preferences. In economic theory, it is postulated that each individual has a set of preferences. He selects a preferred set of objects of desire from his available alternatives. There are no objective criteria by which one set of preferences can be judged as "better" or "worse" than another set because there are simply no commonly accepted standards for evaluation. In other words, it is impossible to demonstrate that preferring Bordeaux wines is superior to preferring Burgundy; or a preference to attend the University of Chicago is superior to Harvard University.

Preferences are generally accepted as given. The most that can be objectively determined is whether, given an opportunity set, the individual is optimizing. Our reasoning about preferences suggests that it also applies to preferences for human attributes such as race, sex, nationality, religion, beauty or any other attribute. From a strictly analytical view, there is no conceptual distinction to be made between preferences for race, nationality, sex and preferences for universities and wine.

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Discrimination?" Journal of Economic Perspectives, Vol 12, No. 2 (Spring 1998), p. 95.

<sup>13</sup>Gordon W. Allport, The Nature of Prejudice (Cambridge: Addison-Wesley, 1954), p. 9.

One might rejoin by asserting that racial preferences are not comparable to other kinds of preferences in the consequences they have for society and for individuals.<sup>14</sup> The indulgence of racial preferences has specific effects that the indulgence of preferences for certain wines do not have but are the preferences basically different? If so, how do they differ? A widespread preference for Bordeaux wines "harms" Burgundy producers by reducing the value of resources held in Burgundy production. If the harmful consequences of preferences are generally thought of as reducing the value of some resources while increasing the value of others, then preferences for human physical attributes have similar effects. One important, and by no means trivial, difference between preferences for certain racial attributes and those for wines is that the latter are not as specialized as the former. If Burgundy producers see a widespread preference for Bordeaux wines, they might be able to convert their resources into Bordeaux production. Racial attributes are more specialized. That is, people who are black cannot become white, though this is not entirely true: one study estimated that at one time approximately 2,600 Negroes become white, - "pass" -each year.<sup>15</sup>

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<sup>14</sup>See, John J. Donahue III, "Discrimination in Employment," in The New Palgrave Dictionary of Economics and the Law, ed. Peter Newman (London: Macmillan Reference, Ltd., 1998). p.617.

<sup>15</sup>Eckard, E. W., "How Many Negroes Pass?," American Journal of Sociology(May, 1947), pp. 498-500.

The fact that racial attributes are specialized, unchangeable (or immutable as the U.S. Equal Employment Opportunity Commission calls them) does not place them in a class by themselves.<sup>16</sup> Persons with average and higher I.Q.s are generally preferred to those with below-average I.Q.s; persons who are not physically disabled are preferred to those who are; non-stutterers are preferred to stutterers; women with attractive features are preferred to those who are unattractive. In each of these cases, and many others, the less-preferred attribute is unchangeable. In each case the less-preferred person might suffer a competitive disadvantage in some arenas. Disadvantage and advantage are the inevitable consequences of differences in individual tastes, abilities, and traits, and freedom of choice in a free society.

Human preferences, whether for physical attributes, such as race, or for other objects of desire such as food, child rearing practices, alcohol consumption, addictive drugs or entertainment can have a moral dimension. There might be a moral consensus condemning preferences for forms of entertainment such as pornographic movies; there might also be a moral consensus that condemns certain race and sex preferences. The fact of a consensus on what constitutes moral or immoral preferences does not alter the fact that people do

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<sup>16</sup>The U.S. Equal Employment Opportunity Commission, "Race-Related Characteristics and Conditions," (2002), [Internet Source], retrieved 7/24/03, from the world wide web: <http://www.eeoc.gov/facts/fs-race.html>.

exhibit preferences and there is no commonly agreed upon standard by which we can objectively decide whether one set of preferences is more moral or righteous than another. Moreover, there is no objective standard or proof that neutral or indifferent racial preferences should be held with respect to any association be it: dating and marriage, or employment and renting. Law professor, Larry Alexander, differs saying, "Where harmful social effects will ensue from bias, given the numbers and group characteristics, there is probably a case for legally prohibiting biased choices in certain realms otherwise left to private choice, particularly the economic realm. . . . There is therefore less reason to believe there is a moral right to make biased choices when they produce harmful consequences, even within a framework that meets the minimum standards of justice."<sup>17</sup> Alexander goes on to conclude: "In short, in an otherwise just society, discriminatory preferences are intrinsically morally wrong if premised on error, moral or factual, about the dispreferred. Discriminatory preferences are extrinsically morally wrong if their social costs are large relative to the costs of eliminating or frustrating them. And if a discriminatory preference is morally wrong--and if there is no moral right that protects its exercise--then there is a case for legally prohibiting its exercise if the costs of legal prohibition and enforcement are low relative

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<sup>17</sup>Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," University of Pennsylvania Law Review, Vol. 141 (November, 1992), p. 163.

to the social gains to be achieved."<sup>18</sup>

Another legal scholar carries the argument against preference indulgence a step further, arguing the unfairness inherent in the legal requirement that litigants should bear the burden of proving that the plaintiff intentionally discriminated against him. Charles R. Lawrence argues that individuals living in a racist society unconsciously discriminate without even knowing it because of stereotypes and attitudes that dwell deeply in their psyches.<sup>19</sup>

### Prejudice

In much of the racial literature, prejudice is usually seen as suspicion, intolerance or an irrational hatred of other races. Sometimes prejudice is seen oppression as suggested by law professor Khiara M. Bridges when he says, "Therefore, if racial prejudice, the subordination of people of color, and White supremacy persist, they do so largely because the legal system sanctions them."<sup>20</sup> Other times prejudice is seen as racial preferences as implied by Justice O'Connor, writing for the majority Adarand Contractors, Inc. v. Pena (1995), striking down a government set-aside "[B]ecause that

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<sup>18</sup>Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," University of Pennsylvania Law Review, Vol. 141 (November, 1992), p. 219.

<sup>19</sup>Charles R. Lawrence, "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 Stanford Law Review(1987) p. 328ff.

<sup>20</sup>Khiara M. Bridges "Note on the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue," Columbia Law Review, 102 (January, 2002), p. 143.

perception-especially when fostered by the Congress of the United States -can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor."<sup>21</sup>

These visions of prejudice expose analysts to the pitfalls of making ambiguous statements and advancing faulty arguments. A useful operational definition of prejudice can be found by examining its Latin root (praejudicium) meaning "to judge before the facts are known." Thus, we might define prejudicial acts as: decision-making on the basis of incomplete information.

Decision-making on the basis of incomplete information is necessary and to be expected in a world of scarcity, uncertainty, complexity and costly information. Another common experience is erroneous interpretation of information. Furthermore, different individuals might arrive at different interpretations even if confronted with the same information. Also, different people reach different decisions on just what constitutes the optimal quantity of information to gather prior to making decisions.

Consider a simple, yet intuitively appealing, example of how decisions might be made on the basis of incomplete information (and possibly erroneous interpretation of evidence). Suppose a fully grown tiger suddenly appeared in a room. A reliable prediction is

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<sup>21</sup>Adarand Constructors, Inc. v. Pena (1995) 115 S.Ct. 2097, p. 243.

that most individuals would endeavor to leave the area with great dispatch. Such a response to the tiger's presence is not likely to be based on detailed information about the behavioral characteristics of that *particular* tiger. The response is more likely to be based upon one's stock of information held about tigers as a class.

The individual pre-judges; we might say he employs stereotypes. He is not likely to seek additional information because he calculates that the expected cost of an additional unit of information about that tiger, such as talking to or petting him, is likely to exceed the expected benefit. He simply ascribes known or surmised group characteristics to the individual tiger.

Most often when people use the words prejudice and stereotype, they are pejorative judgements to refer to those whose chosen quantity of information, for decision-making, is deemed too small by the observer. However, what constitutes the optimal quantity of information collected before decisions are made is subjectively determined by the individual's calculation of his costs and benefits.

Information is not costless. To acquire an additional unit of information requires a sacrifice of time, effort, or other resources. Thus, people seek to economize on information cost. In doing so people tend to substitute less costly forms of information for more costly forms. Physical attributes are cheap-to-observe. If a particular physical attribute is perceived as correlated with a

more costly-to-observe attribute, then people might use that physical attribute as an estimator or proxy for the more costly-to-observe attribute. The cheaply observed fact that an individual is short, an amputee, a black, or a woman provides what some people deem sufficient information for decision-making or predicting the presence of some other more costly to observe attribute. For example, if asked to identify individuals with doctorate degrees in physics only by observing race and sex, most of us would assign a higher probability that white or Asian males would have such degrees than black males or women. Such behavior is what decision theory expects where an unobservable attribute must be estimated from an observable one.

Stereotyping and prejudging can be independent of preferences.

Observing a person's decision-making behavior permits us to say nothing unambiguous about that person's personal preferences with regard to race, sex, ethnicity and nationality.

A simple example can demonstrate this. Imagine the reader is on a particular university campus. He is offered: pick a five-person basketball team from a group of twenty students. The group consists of five black males, five white males, five black females and five white females. He has zero information about their basketball proficiency and they are otherwise indistinguishable except by race and sex. That is, they are identical in terms of other physical characteristics: weight, height, etc. He is offered

that if his selected team wins the basketball game, he wins a \$10,000 prize. Assuming that the person's objective is to maximize his winnings, he would probably find his selection dominated by black males.

What can an observer, watching that person's choices, say about his race or sex preferences? There is absolutely nothing unambiguous that can be said about the person's racial or sex preferences simply by observing choices based on race and sex. Moreover, a person having antipathy against blacks would select in the identical fashion so long as maximizing winnings dominated his objective. Furthermore, given the high correlation between race, sex and basketball proficiency, would anyone care if a racial preference for white males were indulged by the chooser? He would personally bear the cost of preference indulgence.

Physical characteristics can be used as proxies for other costly to observe characteristics. Some racial and ethnic groups have higher incidence and mortality from various diseases than the national average. In 1998, rates of death from cardiovascular diseases were about 30 percent higher among black adults than among white adults. Cervical cancer rates were five times higher among Vietnamese women in the U.S. than among white women. Pima Indians of Arizona have the highest known diabetes rates in the world.<sup>22</sup>

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<sup>22</sup>Diabetes Foundation of Mississippi, Inc., "High Risk Group - Native Americans Prevalence" [Internet Source], retrieved 7/24/03, from the world wide web:

Prostate cancer is nearly twice as common among black men as white men.<sup>23</sup>

Whether genetics, environment, or some other factor accounts for the association between race and some diseases, it is undeniable that such an association exists. As such it means that a physical characteristic such as race can be used as a proxy for the probability of some other characteristic such as prostate cancer, and cervical cancer. As such health providers can assess patient screening needs.

### Racial Indicators

One might take the position that while it is legitimate for doctors to use race or ethnicity as indicators of the higher probability of certain diseases, it is not legitimate to use race or ethnicity as indicators for worker productivity, criminal behavior or basketball proficiency. Other than simply stating that it is acceptable to use race or ethnicity as information acquisition technique in the case of medicine and not in other areas of life, is there really a difference? Surely, race and ethnicity are not perfect indicators of the risk of prostate cancer or hypertension and neither are they perfect indicators of SAT scores, criminal

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<http://www.msdiabetes.org/nativeamericans.html>.

<sup>23</sup>University of Maryland Medicine, "Urological Disorders. Prostate Cancer" May, 2003), [Internet Source], retrieved 7/24/03, from the world wide web: <http://2g.isg.syssrc.com/urology-info/proscan.htm>.

behavior, basketball or football playing or sprinting proficiency; however, there are concrete factual data that surely indicates associations. For example: In 2002 the average black score on the combined math and verbal portions of the SAT test was 857. The average white score on the combined math and verbal SAT was 17 percent higher at 1060.<sup>24</sup> While blacks are 13 percent of the population, they are 80 percent of professional basketball players and 65 percent of professional football players. Blacks who trace their ancestry to West Africa, including black Americans, hold more than 95 percent of the top times in sprinting.<sup>25</sup> For the crime of homicide, over the years 1976-2000 blacks, 13 percent of the general population, were 51.5 percent of the offenders, whites were 46.4 percent and others two percent.<sup>26</sup>

Using race as an indicator does not necessarily tell us anything about the chooser's racial preferences. The Washington Lawyers' Committee filed a lawsuit in April 2001 on behalf of Mr. Bryan Greene, a black man, against Your Way Taxicab Company for

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<sup>24</sup>"Latest News: The Expanding Racial Scoring Gap Between Black and White SAT Test Takers," The Journal of Blacks in Higher Education (2002), [Internet Source], retrieved 7/24/03, from the world wide web: [www.jbhe.com/latest/37\\_b&w\\_sat.html](http://www.jbhe.com/latest/37_b&w_sat.html)).

<sup>25</sup>Jon Entine, Taboo: Why Black Athletes Dominate Sports and Why We Are Afraid to Talk about It. (New York: Public Affairs, 2000), p. 31.

<sup>26</sup>U.S. Department of Justice, Bureau of Justice Statistics, "Homicide Trends in the U.S. Trends by Race," (2002), [Internet Source], retrieved 7/24/03, from the world wide web: <http://www.ojp.gov/bjs/homicide/race.htm#ovrelrace>.

violations of 42 U.S.C. sec. 1981, and the District of Columbia's Human Rights Act that prohibit discrimination in the making of contracts. As Mr. Greene approached a hotel entrance, the doorman was assisting a customer out of a Your Way Taxicab. The doorman saw Mr. Greene and attempted to hold the cab for him; however, when the driver saw Mr. Greene he sped away. After mediation, Your Way Taxicab Company reached an out of court settlement.<sup>27</sup>

In a number of cities there have been similar complaints by blacks of similar behavior by taxicab drivers. The question we might ask; are the driver's decisions based upon racial preferences or might they fear being asked to go into a neighborhood where there is a high probability of being robbed, assaulted, or murdered? By simply knowing that a driver refused a black we cannot make an unambiguous statement about whether the decision was motivated by racial preferences or not.

Evidence that driver decisions might very well be based on criteria other than racial preferences is seen in a 1999 story written by James Owens titled "Capital Cabbies Salute Race Profiling." In the story James Owens says<sup>28</sup>

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<sup>27</sup>Washington Lawyers' Committee for Civil Rights and Urban Affairs, "Washington Lawyers; Committee Update. Vol. 9, No. 1. Public Accommodations. Taxicab Discrimination." (Spring 2003), [internet source], retrieved 7/24/03, from the world wide web: [http://www.washlaw.org/news/update/public accommodations spring 2003.htm](http://www.washlaw.org/news/update/public%20accommodations%20spring%202003.htm)

<sup>28</sup>James Owens, "Capital Cabbies Salute Race Profiling," (1999), [Internet Source], retrieved 7/24/03, from the world wide web:

If racial profiling is "racism," then the cab drivers of Washington, D.C., they themselves mainly blacks and Hispanics, are all for it. A District taxicab commissioner, Sandra Seegars, who is black, issued a safety-advice statement urging D.C.'s 6,800 cabbies to refuse to pick up "dangerous looking" passengers. She described "dangerous looking" as a "young black guy. . . with shirttail hanging down longer than his coat, baggy pants, unlaced tennis shoes," etc. That's one typical description - but the cabbies know, from fear-filled experience, about many other "looks" of black-male threat, especially at night. She also warned cabbies to stay away from low-income black neighborhoods (which comprise much of Washington, D.C.). Her action was triggered by the most recent murder of a cabbie in Southeast Washington."

Another example of race as an indicator is seen in the case where residents in Southwest Washington filed suit in U.S. District Court after Domino's Pizzas repeatedly refused to make door deliveries in certain neighborhoods and instead made customers meet drivers at the curbside to pay and receive their delivery orders. The lawsuit alleged racial discrimination by Domino's Pizza Inc., and Team Washington Inc., a company that operates more than 50 Domino's stores. According to the plaintiffs, Domino's delivers to the door in Georgetown and other mostly white areas of Northwest Washington. The suit also alleged that deliverymen engaged in similar delivery decisions in Southeast Washington's Potomac Gardens, where another customer filed a bias lawsuit. Again, the question is were the drivers indulging their racial preferences or acting out of fear of assault or robbery.

According to Pizza Marketing Quarterly, similar charges of

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<http://home.netcom.com/~owensva/cabbie.html>.

racial discrimination were levied in St. Louis, Missouri against Papa Johns pizza delivery. Cathy Juengel, a St. Louis Papa John's district manager, said she could not and would not ask her drivers to put their lives on the line. She added that the racial discrimination accusation is false because 75 to 85 percent of the drivers in the complaining neighborhood are black and, moreover, most of those drivers lived in the very neighborhood being denied delivery service.<sup>29</sup>

### Public Policy

If one assumes that racial preferences against blacks drives a particular decision, then he is likely to call for policy like that of the San Francisco Board of Supervisors. After a pizza deliveryman was shot and killed in a San Francisco housing project, Domino's suspended pizza deliveries in the highest crime areas of the city. In response, the San Francisco Board of Supervisors enacted an ordinance making it illegal for Domino's (or any other fast-food deliverer) to refuse to deliver in areas the company believes would put its employees' lives in danger.

One seriously doubts that racial preferences against blacks was the motivating force behind Domino's delivery policy but by the actions taken by the San Francisco Board of Supervisors one would

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<sup>29</sup>Stephen Rosamond, "What do you Say or Do in a Public Relations NIGHTMARE," PMQ Pizza Marketing Quarterly, [Internet Source], retrieved 7/24/03, from the world wide web: [http://www.pmq.com/pr\\_nightmare.shtml](http://www.pmq.com/pr_nightmare.shtml).

reach that conclusion. Similarly, decisions made by taxicab drivers not to cruise high crime areas, or pick up passengers that drivers surmise are destined to high crime areas, cannot be unambiguously interpreted as negative racial preferences for blacks.

There is no question that law-abiding black citizens are offended by, and bear the cost of, taxicabs passing them up only to pick up a white passenger down the street or not having pizza deliveries on the same terms as white customers. They are treated unequally through no fault of their own. But policy should not be based on moral indignation against what is seen as an injustice, calculating only benefits; the costs should enter the calculation as well. That means we should confront the question of how many pizza deliveries are worth how many injured, robbed or dead pizza deliverymen? Confronting the real-world options this way might cause policymakers to focus attention away from charges of preferences against blacks to the real villains of the piece - namely those blacks who have made black and high crime perceived as being synonymous.

#### What Lawyers Say

The canonical idea of "anti-discrimination" in the United States condemns the differential treatment of otherwise similarly situated individuals on the basis of race, sex, national origin, or other protected characteristics. "Statutes prohibiting racial discrimination in public accommodations, employment, or the housing

market are by now reasonably uncontroversial."<sup>30</sup> Not all legal scholars agree: "Forced associations are in principle no better than legal prohibitions against voluntary associations."<sup>31</sup> Indeed, the true test of one's commitment to freedom of expression does not come when one permits others the freedom to express ideas with which he agrees. The true test comes when one permits others to express ideas he finds offensive. The same test applies to one's commitment to freedom of association, namely when he permits others to associate in ways he deems offensive. "An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all. . . . By its nature the antidiscrimination principle is interventionist."<sup>32</sup>

#### Freedom of Association vs. Forced Association

Consider the case of Mildred, a Negro woman, and Richard P. Loving, a white man, Virginia residents who traveled to Washington, D.C. in June 1958, and were married pursuant to its laws. Later,

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<sup>30</sup>Robert J. Cottrol, "The Long Lingered Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas," Tulane Law Review, Vol. 76, No. 11 (November 2001), p. 21.

<sup>31</sup>Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (Cambridge, Massachusetts: Harvard University Press, 1992), p. 142.

<sup>32</sup>Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (University of Chicago Press, 1992), p. 3-4.

when they returned to Virginia, the grand jury of the Circuit Court of Caroline County issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. Specifically, Section 20-58 of the Virginia Code: "Leaving state to evade law.--- If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return and reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-59, and the marriage shall be governed by the same law as if it has been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage." Section 20-59 provides: "Punishment for marriage.--- If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

On January 6, 1959, the Lovings pleaded guilty to violating Virginia's antimiscegenation laws and were sentenced to one year in jail; however, the trial judge offered to suspend the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. The Virginia Supreme Court of Appeals upheld the decision and the constitutionality of Virginia's antimiscegenation statutes. The Lovings successfully challenged the constitutionality of Virginia's

antimiscegenation statutes before the U.S. Supreme Court in Richard Perry Loving et ux. v. Virginia.<sup>33</sup>

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<sup>33</sup>Richard Perry Loving et us., Appellants, v. Virginia 388 US1, 18 L ed 2d 1010, 87S Ct 1817, Argued April 10, 1967. Decided June 12, 1967. [Internet Source], retrieved 7/24/03, from the world wide web: <http://www.ameasite.org/loving.asp>.

Today, most Americans accept interracial marriages. According to a 1994 survey conducted by the National Opinion Research Center, nearly three-quarters of Americans would not favor laws banning interracial marriages.<sup>34</sup> Most Americans would agree that a law prohibiting interracial marriage is a gross violation of freedom of contract or association; however, a law mandating interracial marriage would be no less offensive to freedom of contract and association. As Richard Epstein said, "Forced associations are in principle no better than legal prohibitions against voluntary associations."<sup>35</sup> It would appear that we could generalize that any prohibition against association or any mandate to associate are equally offensive to basic human rights.

Recently, the all-male policy of Augusta National Golf Club, the home of the Masters Tournament, has come under considerable criticism. Whether one approves or disapproves of the Club's decision not to admit women as members, the more important issue is whether it would violate civil rights if the Club were mandated to do so. In reasoning about this matter, it would seem that an answer to a very simple question would help us: Does a person have a

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<sup>34</sup>The National Opinion Research Center, "1972-1974 General Social Survey Cumulative File," (1994), [Internet Source], retrieved 7/24/03, from the world wide web: <http://ist-socrates.berkeley.edu:7502/GSS/Doc/gss008.html#racmar>.

<sup>35</sup>Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (University of Chicago Press, 1992), p. 3-4.

property right entitling them to do business with an unwilling buyer or seller? It would appear that the answer is an unambiguous no.

The essence of a property right is the unrestricted liberty to decide with whom you shall share, or exclude from those things or activities that are deemed yours. Clearly, those who are offended by the Augusta National Golf Club's sexually discriminatory practices are free to exercise their own property rights by refusing to do business with the club or its membership and use their free speech rights to try to persuade others to do the same. That is consistent with basic civil rights; however, by using the coercive powers of the state to forcibly deprive the Club members of its right to exclude whomever it chooses to exclude, for whatever reason, we descend closer to the totalitarian state.<sup>36</sup>

### Racial Segregation

The legal literature is steeped with ambiguous usage of racial segregation. A small sample follows.

Yale University professor Robert A Burt says:

Residential segregation was the dominant instrument for regulating social interactions between blacks and whites in the North. Segregated schools, for instance, were the norm in both North and South, but whereas Southern school segregation involved busing white and black students from their adjacent homes to separate, racially designated schools, Northern school segregation was accomplished by assigning students to schools within their own racially

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<sup>36</sup>Legal Information Institute, Cornell Law School, "42 USC § 2000a (e)" (15 Am. Jur. 2d, § 35), Civil Rights [Internet Source], retrieved 7/26/03, from the world wide web: <http://www4.law.cornell.edu/uscode/42/2000a.html>.

segregated neighborhoods.<sup>37</sup>

Michelle Adams says:

Triggered by "systematic avoidance" of interracial contact, white migration from urban public schools is a perceptible phenomenon, and public schools in metropolitan areas are increasingly becoming racially segregated.<sup>38</sup>

Elizabeth S. Anderson says,

Segregation is therefore a proper target of direct remediation, whether it is de facto or de jure, whether caused by prior illegal discrimination or not. . . . Racial segregation in the institutions of American civil society operates at three main levels: residential, educational, and occupational. Residential segregation is the norm for most African Americans. According to a study based on 1980 census results, in the thirty metropolitan areas containing a majority of all blacks in the United States, sixty-eight percent of blacks would have to move to achieve a uniform racial composition across the metropolitan area.<sup>39</sup>

Finally, Leland Ware says:

The Neighborhood Schools Act is an unlawful obstacle to the goal of equal educational opportunities. It will reinforce racial and economic isolation by disregarding the effects of residential segregation. Proponents of neighborhood schools did not consider the legacy of racial segregation that is reflected in current residential patterns. They erroneously assumed that families have

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<sup>37</sup>Robert A. Burt, "Liberals' Labors Lost. Robert A. Burt on the passage and aftermath of the watershed 1968 Civil Rights Act," Legal Affairs. The Magazine at the Intersection of Law and Life. [Internet Source], retrieved 7/26/03, from the world wide web: [http://www.legalaffairs.org/issues/January-February-2003/story\\_burt\\_janfeb2003.html](http://www.legalaffairs.org/issues/January-February-2003/story_burt_janfeb2003.html).

<sup>38</sup>82 1089 Boston University Law Review December, 2002 Intergroup Rivalry, Anti-competitive Conduct and Affirmative Action.

<sup>39</sup>Elizabeth S. Anderson, "Integration, Affirmative Action and Strict Scrutiny," New York University Law Review (November, 2002), p. 1197.

exercised a choice in deciding where they reside and, therefore, a choice as to which schools their children will attend.<sup>40</sup>

The way the term segregation is used in these statements is quite common but nonetheless confusing and thus gives rise to fuzzy thinking. Consider the following hypothetical. Blacks are about 65 percent of the Washington, D.C. population. Reagan National Airport serves the Washington, D.C. area and like every airport it has water fountains. At no time have I seen anything close to blacks being 65 percent of water fountain users. It is a wild guess but the writer speculates that at most five or ten percent of the users are black.

To the extent that this observation approximates reality would anyone move to declare that Reagan National Airport water fountains are racially segregated? Casual observation of ice hockey games would suggest that the percentage attendance of blacks are by no means proportional to their numbers in the general population; a similar observation can be made about opera attendees, dressage performances and wine tastings. The population statistics of states such as South Dakota, Iowa, Maine, Montana and Vermont show that not even one percent of their populations are black. On the other hand, in states such as Georgia, Alabama, and Mississippi, blacks are over-represented. Would anyone use racial segregation to account for these observations?

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<sup>40</sup>20 Delaware Lawyer Fall, 2002 Feature Redlining Learners: Delaware's Neighborhood Schools Act.

Just because blacks are not proportionately represented in some activity, according to their numbers in the general population, how analytically useful is to assert that the activity is racially segregated, at least in ordinary usage of the term. It seems that a more useful test to determine whether an activity is racially segregated or not is to see whether, for example, if a black person is at Reagan National Airport, is he free to drink at any water foundation he chooses. If the answer is in the affirmative, then the water fountains are not segregated, and that would be true even if a black person never uses the water fountains.

The identical test applies to the question of school segregation. If a black student lives within a particular school district, is he free to attend that school? If he can, then the school is not segregated, even if not a single black attends that school. The same test applies to determining whether ice hockey games, operas, wine tastings, housing and other activities are racially segregated or not.

At one time there was racial segregation. If a black wanted to use a water fountain, he was denied, often by law, and similarly prohibited by law from attending certain schools because of race. Today none of that is true, and that means there is no school segregation. When an activity is not racially mixed today, a better word for it is racially homogeneous, which does not mean that it is racially segregated. It would surely be deemed ridiculous, fool-

hardy and a gross abuse of government power if, for example, one were to conclude that since blacks do not use Reagan National Airport fountains according to their numbers in the general population we should order the busing of blacks from water fountains where they are over-represented to those where they are under-represented.

Similarly, I doubt whether one would propose compelling blacks to move from Georgia to Iowa and the reverse for whites until there was some sort of preconceived notion of what constitutes racial integration across states.

#### Government-subsidized Preference Indulgence

People do have racial preferences but there is no evidence that suggests that they will indulge those preferences at any cost. However, public policy can lower the cost of preference indulgence, thereby giving people inducement to indulge them more. In general, any law that fixes prices lowers the cost of preference indulgence.

Let us explore a hypothetical and then discuss some actual examples.

It is a fairly safe prediction that, holding all else constant, most people prefer filet mignon to chuck steak. While filet mignon is preferred to chuck steak, chuck steak has no problem selling. It would be a simple task to get more people to indulge their preferences for filet mignon and discriminate against the consumption of chuck steak. One would only have to fix the price of chuck steak so that it was equal to or close to the price of filet mignon.

Suppose initially chuck steak sold for \$4 a pound and filet mignon \$10. Even though chuck steak is less-preferred, it sells because it can offer buyers a "compensating difference." That is, in effect chuck steak offers the buyer \$6, the difference in price between it and filet mignon. It costs buyers \$6 to indulge their preferences for filet mignon.

However, if it were established by law that both filet mignon and chuck steak sell for the same price, say \$10 a pound, chuck steak could not offer a compensating difference. The cost of indulging one's preference for filet mignon would be zero, the difference in price. A basic postulate of economic theory says that the lower the cost indulging one's preference for an object of desire, the more one can expect to see people doing it.

#### Minimum Wage Law

The Fair Labor Standards Act establishes minimum wage, overtime pay, record-keeping, and child labor standards affecting workers in the private sector and in Federal, State, and local governments. The current minimum wage is \$5.15 an hour. While Congress can legislate that no matter whom an employer hires he must be paid \$5.15 an hour, Congress cannot mandate that the value of an employee's hourly output be in fact worth \$5.15.

The minimum wage discriminates against the less preferred worker. One component of being less-preferred has to do with worker productivity. That is, employers will view it as a losing economic

proposition to hire a worker who is so unfortunate as to have skills that allow him to produce only \$4 worth of value an hour and pay him \$5.15. Another measure of less-preferred from a particular employer's point of view might be the race of the employee. If an employer is forced to pay \$5.15 an hour to no matter whom he hires, and both an equally productive white worker and a black worker show up for the job, then there is no economic criteria for selection. Thus, the employer will use non-economic criteria. One of those non-economic criteria might be the race of the employee. If the employer prefers white workers to black workers, the cost of indulging that preference, like in the steak example above, will be zero.

The minimum wage law is one of the most effective tools in the arsenal of racists everywhere. During South Africa's apartheid era white workers supported wage regulation. White unionists "argued that in absence of statutory minimum wages, employers found it profitable to supplant highly trained (and usually highly paid) Europeans by less efficient but cheaper non-whites."<sup>41</sup> In fact, "equal pay for equal work" became the rallying slogan of the white labor movement. Keir Hardie, a British labor leader was greeted with rotten eggs, during his visit to South Africa in 1907, because he advocated equality between whites and Indians. "He was afterwards allowed to speak, however, when the workers found that he

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<sup>41</sup>G. V. Doxey, The Industrial Colour Bar in South Africa (London: Oxford University Press, 1961), p. 112.

believed in 'equal pay for equal work' regardless of colour or creed."<sup>42</sup>

One South African union leader lamented, "There is no job reservation left in the building industry, and in the circumstances I support the rate for the job [minimum wages] as the second best way of protecting our white artisans."<sup>43</sup>

When Frederick Creswell became Minister of Labour, he introduced the Wage Bill of 1925, saying: "If our civilization is going to subsist we look upon it as necessary that our industries should be guided so that they afford any men desiring to live according to the European standards greater opportunities of doing so, and we must set our face against the encouragement of employment merely because it is cheap and the wage unit is low."<sup>44</sup>

The Economic and Wage Commission of 1925 responded to the Wage Bill, saying:

While definite exclusion of the Natives from the more remunerative fields of employment by law has not been urged upon us, the same result would follow a certain use of the powers of the Wage Board under the Wage Act of 1925, or of other wage-fixing legislation. The method would be to fix a minimum rate for an

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<sup>42</sup>Edward Roux, Time Longer Than Rope: A History of the Black Man's Struggle for Freedom in South Africa (Madison, Wisconsin: The University of Wisconsin Press, 1964), p. 125.

<sup>43</sup>G.M.E. Leistner and W.J. Breytenbach, The Black Worker of South Africa (Pretoria, South Africa: The African Institute, 1975), p. 28.

<sup>44</sup>Doxey, The Industrial Colour Bar, p. 155.

occupation or craft so high that no Native would be likely to be employed. Even the exceptional Native whose efficiency would justify his employment at the high rate, would be excluded by the pressure of public opinion, which makes it difficult to retain a Native in an employment mainly reserved for Europeans.<sup>45</sup>

Sheila T. van der Horst's findings tend to support the Commission's conclusions: "Neither the Industrial Conciliation Act nor the Wage Act permits differential rates to be laid down on the ground of race. Consequently, where Non-Europeans, in practice principally the Cape Coloured, are employed as artisans they are subject to the same statutory minimum rates as Europeans. Wage legislation of the type has tended to restrict the openings for the less capable workmen and particularly for Non-Europeans as they are prevented from offsetting lack of skill by accepting lower wage rates."<sup>46</sup>

In the 1930's white workers approved of the Wage Board's efforts to extend statutory minimum wages to nonwhites. Broydell, the Labour Party Minister for Posts and Telegraphs, explained that whites were being ousted from jobs by "unfair competition", particularly by the Indians in Natal. Broydell urged that employers be

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<sup>45</sup>Doxey, The Industrial Colour Bar, p. 155.

<sup>46</sup>Sheila T. van der Horst, "Labour", in Handbook on Race Relations in South Africa, ed., Ellen Hellman (New York: Octagon Books, 1975), pp. 133-34.

forced to pay Indians the same wages they pay whites.<sup>47</sup>

Identical discriminatory forces were at work in the U.S. In 1909, the Brotherhood of Locomotive Firemen called a strike against the Georgia Railroad. One of their demands called for the complete elimination of blacks from the railroad. Instead of elimination, the arbitration board decided that black firemen, hostlers and hostlers' helpers be paid wages equal to the wages of white men doing the same job. The white unionists were delighted with the decision, saying, "If this course of action is followed by the company and the incentive for employing the Negro thus removed, the strike will not have been in vain."<sup>48</sup>

The power of wage regulation to promote racially discriminatory ends is also seen by the famous Washington agreement between the Brotherhood of Railway Trainmen and the Southern Railroad Association, signed in Washington, D. C. in January 1910:

No larger percentage of Negro firemen or yardmen will be employed in any division or in any yard than was employed on January 1, 1910. If on any roads this percentage is now larger than on January 1, 1910, this agreement does not contemplate the discharge of any Negroes to be replaced by whites; but as vacancies are filled or new men are employed, whites are to be taken until the percentage of January first is again reached.<sup>49</sup>

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<sup>47</sup>Merle Lipton, Capitalism and Apartheid: South Africa, 1910-84 (New Jersey: Rowman & Allanheld Publishers, 1985), p. 189.

<sup>48</sup>Sterling D. Spero and Abram Harris, The Black Worker (New York: Kennikat Press, 1931), p. 291.

<sup>49</sup>Sterling D. Spero and Abram Harris, The Black Worker (New York: Kennikat Press, 1931), p. 291.

That part of the Washington agreement was followed by:

Negroes are not to be employed as baggagemen, flagmen or yard foremen, but in any case in which they are now so employed, they are not to be discharged to make places for whites, but when the positions they occupy become vacant, whites shall be employed in their places.<sup>50</sup>

The Brotherhood of Railway Trainmen, like their union brothers in South Africa, recognized that, "Where no difference in the rates of pay between white and colored exists, the restrictions as to the percentage of Negroes to be employed does not apply."<sup>51</sup>

This section of the Washington agreement reaches the same conclusion reached by South Africa's Mine Workers Union in 1919, when it said:

The real point on that is that whites are being ousted by colored labour . . . It is now a question of cheap labour versus what is called "dear labor", and we consider we will have to ask the commission to use the word "colour" in the absence of a minimum wage, but when that [minimum wage] is introduced we believe that most of the difficulties in regard to the coloured question will automatically drop out.<sup>52</sup>

Both the U. S. Brotherhood of Railway Trainmen and the South African Mine Workers Union recognized the power of wage regulations as a means to accomplish racist goals. They both saw that setting a floor on wages could be more effective and politically cheaper than

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<sup>50</sup>Sterling D. Spero and Abram Harris, The Black Worker (New York: Kennikat Press, 1931), p. 291.

<sup>51</sup>Sterling D. Spero and Abram Harris, The Black Worker (New York: Kennikat Press, 1931), p. 291.

<sup>52</sup>Frederick A. Johnstone, Class, Race and Gold: A Study of Class Relations and Racial Discrimination in South Africa (London: Routledge & Kegan Paul, 1976), p. 158.

the imposition of quotas and color bars in part because they are seldom seen as racially discriminatory and hence are more politically acceptable among decent people (even among those victimized by it) and less subject to constitutional challenge.

### Super Minimum Wages

The Davis-Bacon Act, written in 1931, as amended, is still law today. Its provisions mandate the payment of "prevailing" wages for the various construction trades in all federally financed, or assisted, construction contracts. The Secretary of Labor sets the prevailing wage as the union wage or higher. As such the Davis-Bacon Act has the same racial effect that minimum wages have, albeit a super-minimum wage.

The desire for the racial effect was expressed by its congressional supporters. Congressman Allgood said:

That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.<sup>53</sup>

In support of Senator Bacon's bill, Congressman Upshaw complained of the "superabundance or large aggregation of negro labor," which is a real problem "you are confronted with in any community."<sup>54</sup> In response to Senator Bacon's description of a construction project in

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<sup>53</sup>U. S. Congress, House, Congressional Record, 71st Congress, 3rd Session, 1931, p. 6513.

<sup>54</sup>Hours of Labor and Wages on Public Works, Hearings before the Committee on Labor, House of Representatives, 69th Congress, 2nd Session, February 28, 1927, p. 3.

his district, Representative Upshaw of Georgia remarked:

You will not think a southern man is more than human if he smiles over the fact of your reaction to the real problem you are confronted with in any community with a superabundance or aggregation of Negro labor.<sup>55</sup>

To which Senator Bacon replied:

I just mentioned the fact because that was the fact in this particular case, but the same would be true if you should bring in a lot of Mexican laborers or if you brought in any non-union laborers from any other state.<sup>56</sup>

Congressman John J. Cochran of Missouri echoed similar sentiments, saying he had "received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South."<sup>57</sup>

William Green, president of the AFL, made it clear that what the union's interests were: "[C]olored labor is being sought to demoralize wage rates [in Tennessee]<sup>58</sup>.

Ralph C. Thomas, executive director of the National Association

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<sup>55</sup>Hours of Labor and Wages on Public Works, Hearings before the Committee on Labor, House of Representatives, 69th Congress, 2nd session, February 28, 1927, p. 3.

<sup>56</sup>Hours of Labor and Wages on Public Works, Hearings before the Committee on Labor, House of Representatives, 69th Congress, 2nd Session, February 28, 1927, p. 3.

<sup>57</sup>U.S. Congress, House, Committee on Labor. Hearings on H.R. 7995 & H.R. 9232, 71st Congress, 2nd Session, March 6, 1930, pp. 26-27.

<sup>58</sup>Wages of Laborers and Mechanics on Public Buildings, Hearings, House, Committee on Manufacturers, 71st Congress, 3rd Session, March 10, 1931, pp.????????

of Minority Contractors, lamented that a contractor has "no choice but to hire skilled tradesmen, the majority of which are majority [white]. . . . Davis-Bacon. . . closes the door in such activity in an industry most capable of employing the largest numbers of minorities."<sup>59</sup> Government paperwork requirements for compliance with the Davis-Bacon Act also hampers small contractors. Unlike major contractors, small contractors typically do not have attorneys and personnel with the expertise necessary for paperwork compliance. This confers a competitive advantage to larger, and usually unionized, contractors who do have the resources.<sup>60</sup>

According to Vedder and Galloway, prior to the enactment of the Davis-Bacon Act, black and white construction unemployment was similar. After the enactment of the Davis-Bacon Act, black unemployment rose relative to that of whites.<sup>61</sup> Vedder and Galloway also argue that the period 1930 to 1950 was a period of unprecedented, rapidly increasing government intervention into the economy. It was during this period that the bulk of legislation restraining private wage setting was enacted, such as: the Fair Labor Standards Act, the Davis-Bacon Act, the Walsh-Healey Act, and

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<sup>59</sup>Testimony by the National Association of Minority Contractors, House Subcommittee on Labor Standards of the Committee on Education and Labor, September 30, 1986, p. 3.

<sup>60</sup>Patrick Barry, "Congress's Deconstruction Theory," The Washington Monthly (January 1990), pp. 12-13.

<sup>61</sup>Richard Vedder and Lowell Galloway, Racial Dimensions of the Davis-Bacon Act, Heritage Foundation (November 1990).

the National Labor Relations Act. The Social Security Act also played a role by forcing employers to pay a fringe benefit not previously provided.<sup>62</sup> Vedder and Galloway also note that it was during this period that saw a rapid increase in the black/white unemployment ratio.

### Conclusions

In today's America there is a broad consensus that race-based discrimination in many activities is morally offensive and in many cases rightfully illegal as it should be when there is taxpayer-based provision of goods and services such as public schools and universities, libraries, social services and the like. Even though people should be free to deal with, or refuse to deal with, anyone in strictly private matters, there is little evidence that race-based discrimination would be widespread in today's America. After all there is a difference between what people can do and what they will find it in their interest to do. That this is the case is suggested by laws that once codified racial discrimination in the United States and elsewhere. In the U.S. there were antimiscegenation laws and restrictive covenants. During South Africa's apartheid era there were job reservation laws and laws that reserved certain amenities such as theaters, restaurants and hotels for white use only. One of the first implications of the existence

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<sup>62</sup>Richard K. Vedder & Lowell E. Galloway, Out of Work: Unemployment and Government in Twentieth-Century America (New York: Holmes & Meier), 1993, pp. 279-80.

of a law is that not everyone would voluntarily behave according to the specifications of the law. If they would then there would be no need for the law. After all, there is no law, to the writer's knowledge, that mandates that people shall eat or people shall not toss their weekly earnings onto the street. While in both cases people are free to not eat and they can toss their weekly earnings onto the street, we need not worry because most will not find it in their private interest to do so.

For people concerned about issues dealing with race might focus more attention on those governmental activities that subsidize preference indulgence. We have discussed the minimum wage law and the Davis-Bacon Act, but there are others: such as occupational and business licensing laws, union monopolies, rent controls, and other legal restrictions on peaceable, voluntary exchange.

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(Revised July 28, 2003)